Filed 4/3/09 P. v. Jordan CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JASON JORDAN, Defendant and Appellant.	B207912 (Los Angeles County Super. Ct. No. NA076376)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jesse I. Rodriguez, Judge. Affirmed as modified.

Tara K. Hoveland, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, James William Bilderback II and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jason Jordan was convicted by jury of four counts of second degree robbery (Pen. Code, § 211)[1] and two counts of sexual battery by restraint (§ 243.4, subd. (a)). Defendant was sentenced to ten years in state prison, consisting of the upper term of five years for one count of second degree robbery plus consecutive terms of one year (one-third of the midterm) for each of the remaining counts.

In this timely appeal, defendant contends there was constitutionally inadequate evidence of the required specific intent to support the convictions of sexual battery. He further contends the trial court committed reversible error by refusing to instruct on battery as a lesser included offense of sexual battery. The Attorney General requests that we correct the sentence to include five additional $20 security fees which are mandatory under section 1465.8, subdivision (a)(1). We hold the finding of specific intent was supported by substantial evidence and the court did not commit instructional error. We further order the judgment be modified to include the additional security fees as requested by the Attorney General.

STATEMENT OF FACTS

In the evening of November 6, 2007, defendant and two associates robbed four people in Long Beach. Two of the victims were Mario Vasquez and his girlfriend, C.T. Pointing a BB gun at them, defendant demanded Vasquez's wallet, but Vasquez said "no." Defendant insisted, and Vasquez gave it to him. Defendant pointed the gun at C.T.'s chest and asked her, "what do you got[?]" She told defendant she had nothing. Defendant told C.T., "I'm not fucking with you, bitch. What do you got[?]." She told him she had nothing. Defendant pulled down her top on the left side and sucked on her left breast nipple. Vasquez tried to push defendant, who asked Vasquez what he was doing and again pointed the gun at him. C.T. pulled her top up. Defendant pointed the

---

[1] Hereinafter, all statutory references will be to the Penal Code unless otherwise indicated.

gun back at C.T., pulled down her top again, and sucked on her right breast nipple. She pushed defendant. C.T., who was terrified, gave defendant her cell phone, and defendant ran off

Defendant was apprehended later that evening. He admitted pulling down C.T.'s top and sucking on her nipples. "I don't know what I was thinking. Yeah, I did. That's not something I do. [¶] I licked both of them. I'm really sorry about this."

DISCUSSION

Substantial Evidence Supports the Sexual Battery Convictions

Defendant contends substantial evidence does not support the required finding he sucked the victim's breasts with the specific intent of sexual arousal, sexual gratification, or sexual abuse. The record contains substantial evidence.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--that is, evidence that is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.) The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.)" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) "Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is

physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

Section 243.4, subdivision (a), provides: "Any person who touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery."

"'[S]exual abuse' includes the touching of a woman's breast, without consent, for the purpose of insulting, humiliating, or intimidating the woman, even if the touching does not result in actual physical injury." (*In re Shannon T.* (2006) 144 Cal.App.4th 618, 622.) The jury was instructed in the language of CALJIC No. 10.37 that "[t]he 'specific intent to cause sexual abuse' means a purpose to injure, hurt, cause pain or cause discomfort. It does not mean that the perpetrator must be motivated by sexual gratification or arousal or have a lewd intent."

The manner of touching is relevant, in that the trier of fact "'looks to all the circumstances, including the charged act, to determine whether it was performed with the required specific intent.' [Citations.]" (*People v. Martinez* (1995) 11 Cal.4th 434, 445.) The perpetrator's "purpose in pinching the victim's breast can be inferred from the act itself together with its surrounding circumstances." (*In re Shannon T.*, *supra*, 144 Cal.App.4th at p. 622.)

Defendant argues that his act of touching C.T.'s breasts is not sufficient to establish the required intent. To the contrary, substantial evidence of the intent to become sexually aroused or sexually gratified under section 243.4, subdivision (a), is found in the manner of touching of the victim's breasts. Moreover, the fact that defendant exposed the victim's breasts and committed the acts following her refusal to give him what he demanded is substantial evidence of intent to sexually abuse her by intimidating her to accede to his demand. (*In re Shannon P.*, *supra*, 144 Cal.App.4th at p. 623 [pinching the victim's breast upon her refusal to do the defendant's bidding was sexual battery for the specific purpose of intimidating her to submit].) There was

substantial evidence from which the jury could find defendant's purpose was sexual arousal, sexual gratification, or sexual abuse.

Lesser Included Offense Instruction

Defendant requested instructions on battery[2] and misdemeanor sexual battery as lesser included offenses of sexual battery The court denied the request for an instruction on battery but gave an instruction on misdemeanor sexual battery. Defendant contends the trial court's refusal to instruct on the offense of battery as a lesser included offense of sexual battery violated his rights to due process and a fair trial. We hold the instruction was properly denied, but if error were committed, it was nonprejudicial.

A lesser included offense is one that must be committed in the course of committing the greater, charged offense. (*People v. Birks* (1998) 19 Cal.4th 108, 117.) "[T]he trial court must instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser." (*Id.* at p. 118.)

Defendant's conduct in this case—in which he successively sucked on the victim's breasts to intimidate her into submitting to his robbery at gunpoint is inconsistent with any suggestion that the touching was not for the purpose of sexual arousal, sexual gratification, or sexual abuse. The only evidence defendant points to in support of his contention that the jury could find he was guilty only of battery is his self-serving statement to the police, when he acknowledged he sucked the victim's nipples, but that "I don't know what I was thinking. . . . That's not something I do." This statement does not indicate defendant lacked the specific intent for sexual battery. That defendant claimed his conduct is not something he does during the course of a robbery at gunpoint is hardly

---

[2] "A battery is any willful and unlawful use of force or violence upon the person of another." (§ 242.)

substantial evidence to establish the touching was misdemeanor battery, given the decidedly sexual nature of the act.

As there was no evidence indicating that defendant's purpose was not sexual arousal, sexual gratification, or sexual abuse, the trial court did not err in refusing to instruct on battery as a lesser included offense.

In any event, any instructional error was harmless. Failure to instruct on "all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under *Watson*.[**3**] A conviction of the charged offense may be reversed in consequence of this form of error only if, 'after an examination of the entire cause, including the evidence' (Cal. Const., art. VI, § 13), it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred (*Watson, supra*, 46 Cal. 2d 818, 836)." (*People v. Breverman* (1998) 19 Cal.4th 142, 178.) Based on the nature of defendant's conduct in relation to C.T., combined with the jury's rejection of a finding of misdemeanor sexual battery as a lesser included offense of the felony version of the statute, we hold there is no reasonable probability of a more favorable verdict had the jury been instructed on battery.

Fees

The trial court imposed one $20 court security fee under section 1465.8, subdivision (a)(1). Respondent argues a $20 fee should have been imposed for each of the convictions and asks us to modify the judgment to reflect an additional $100 in court security fees. We agree five additional $20 court security fees under section 1465.8, subdivision (a)(1), should be imposed. (*People v. Walz* (2008) 160 Cal. App. 4th 1364, 1372.)

---

3 *People v. Watson* (1956) 46 Cal. 2d 818, 836.

DISPOSITION

The judgment is modified to add five additional section 1465.8, subdivision (a)(1) $20 fees. The abstract of judgment shall be corrected to reflect the imposition of six security fees of $ 20 each, one for each count as to which defendant was convicted, and a copy of the amended abstract shall be forwarded to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.